No. 84-952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JULIUS M. GERZOF,

Appellant,

— against —

THE GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF IN OPPOSITION TO JURISDICTIONAL STATEMENT AND PETITION FOR WRIT OF CERTIORARI

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October Term, 1984

No. 84-952

JULIUS M. GERZOF, Appellant,

v.

THE GRIEVANCE COMMITTEE FOR

THE TENTH JUDICIAL DISTRICT, Appellee.

ON APPEAL FROM THE COURT OF APPEALS

OF NEW YORK

PRELIMINARY STATEMENT

This brief is submitted in opposition to the appellant's jurisdictional statement and request that it be treated as a petition for a writ of certiorari.

The appellant was suspended from the practice of law by the Appellate Division

of the New York State Supreme Court, Second Judicial Department, by its order of the court, after some three years of motions, appeals and actions, effective October 1, 1977. Such suspension was based upon a disciplinary proceeding wherein it was proven that the appellant had given false testimony before the Judicial Inquiry. He was suspended from the practice of law for three years.

Shortly after his premature application before the Appellate Division for reinstatement, the appellee's office received the affidavit of Joseph J. La Bella, Jr., stating that the appellant had engaged in the practice of law while suspended.

Based on that affidavit and preliminary investigation, his application before the Character & Fitness Committee was stayed pending the determination of the Grievance Committee.

After a report of the matter had been presented to the Grievance Committee for the Tenth Judicial District, it duly voted, based on a finding of probable cause, to seek authorization of the Appellate Division to institute a disciplinary proceeding against the appellant. Such authorization was granted and a notice of petition and petition was personally served upon the appellant.

The petition alleged, briefly, that he had engaged in the practice of law while suspended (Charge One) and submitted false statements to the Appellate Division and the Character & Fitness Committee that he had not practiced law during his suspension (Charge Two).

Hon. Daniel G. Albert, a retired Justice of the Supreme Court of the State of New York, was appointed by order of the Appellate Division, dated

December 9, 1981, as Special Referee, to hear and report on the issues involved and make recommendations.

A hearing was conducted which spanned some nineteen days and created a transcript of more than 3,000 pages with numerous exhibits. Post-hearing memoranda were submitted by both counsel and the Special Referee's report of 19 pages (reprinted in appellant's jurisdictional statement at page - 14a -), along with the entire record, was submitted to the Appellate Division.

In his report, the Special Referee sustained Charge One, deferred on Charge Two (the record of sworn affidavits by the appellant that he had not engaged in the practice of law during his suspension were already before the Appellate Division and the Character & Fitness Committee) and recommended disbarment.

After some motion practice by the appellant and the submission of motions to confirm and disaffirm the Special Referee's findings, the Appellate Division confirmed said findings, sustained Charge Two against the appellant and issued its order of disbarment.

Leave to appeal to the New York State Court of Appeals was made, opposed and denied on the ground that no substantial question was directly involved.

Now the appellant challenges the constitutionality of Judiciary Law §90 and 22 NYCRR Part 691 as he had previously done in 1974 through 1976 (See Mildner v. Gulotta, 405 F. Supp. 182; Gerzof v. Gulotta, 40 N.Y. 2d 825, 386 NYS 2nd 790, 87 Misc. 2d 768).

REASONS FOR NOT TAKING JURISDICTION AND DENYING THE WRIT

A. THE STATE OF NEW YORK HAS NOT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS

The questions raised and the arguments made by the appellant on the constitutionality of the New York State disci - plinary procedure have been time and time again addressed and answered by this Court and the State Courts.

In Gerzof v. Gulotta supra , the Court held as follows:

> Suspension from practice of law that resulted from disciplinary proceedings held pursuant to Judiciary Law were not subject to being characterized as violative of due process on ground that the Appellate Division acted as the grand jury, prosecutor, judge and jury. Const. art. 1, §6; U.S.C.A. Const. Amend. 14.
>
> Disciplinary proceedings held pursuant to Judiciary Law were not violative of due process by reason of fact that they called for procedures that were substantially similar to those followed

in civil actions by providing for a determination based upon a transcript and reported findings. Const. art. 1, § 6; USCA. Const. Amend. 14.

Provisions of Judiciary Law pertaining to procedures to be followed in disciplinary matters are not violative of due process in denying an individual the right to present an oral argument before the trier of facts. Const. art. 1, § 6, U.S.C.A. Const. Amend. 14

Procedure whereby individual who was subject of disciplinary proceedings was presented with notice of charges against him, was given an opportunity to confront and cross-examine adverse witnesses during a hearing before a special referee, and was represented by counsel who was given an opportunity to present a summation to referee, was not violative of due process, notwithstanding claim that individual was not given a statement of reasons for the eventual decision of the Appellate Division, where the referee not only prepared a report and a supplemental report which contained detailed findings of fact and conclusions respecting the specified charges, but a full transcript of the proceedings before the referee was submitted to the Appellate Division with the individual thereafter being given the opportunity

to file an extensive and detailed memorandum to that court. Const. art. 1, §6; U.S.C.A. Const. Amend. 14

Although Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, speaks of a disciplinary proceeding as being of a "quasi-criminal" nature, it "hardly stands for an equation of criminal and disciplinary proceedings, a most unlikely view". Kelly v. Greason, 23 N.Y. 2d 268, 296 NYS 2d 937.

In New York State disciplinary proceedings are deemed to be "special proceedings" and as such, are generally accorded disclosure devises only by leave of the court, so that the court may preserve the summary nature of such proceedings.

(See CPLR, art. 4, §C400:3(6); § 408 and §408.1, McKinney's Consolidated Laws of New York)

A very significant case in the area of attorney discipline is Mildner v. Gulotta supra. In that case Judge Neaher says

that Judiciary Law §90 "is plainly not unconstitutional on its face and does, in fact, appear to comport with traditional notions of due process". He speaks of a disciplinary proceeding as being"an inquest - a gathering of facts concerning the conduct of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else."

Also, he states, that there is no constitutional requirement "that the Appellate Division, as final arbiter of the facts, has personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referees' reports".

Special factors applying to administrative proceedings which call for a written statement of findings and

reasons are not present here.

Also the argument of no evidence appears to be an attempt to relitigate the merits of the State proceedings.

B. THE STATE OF NEW YORK HAS NOT VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION

On the issue of equal protection we have extracted the following precepts from Gerzof v. Gulotta supra :

> The existence of treatment for different individuals is not, in and of itself, a violation of the right to equal protection. Const. art. 1, § 6: U.S.C.A. Const. Amend. 14
>
> Equal protection is not violated unless it is shown that there is no reasonable basis for differing treatment of different classes of individuals. Const. Art. 1, §6, U.S.C.A. Const. Amend. 14
>
> Equal protection requires only that a legislative classification be reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons

> similarly circumstanced shall be treated alike. Const. art. 1, § 6, U.S.C.A. Const. Amend. 14.

In Mildner v. Gulotta, Judge Neaher can be quoted as stating:

> "There must be recognition that, in disciplining professionals, the State may legitimately find reason to conclude that differing procedural safeguards are appropriate for different professionals. (citations omitted). Thus there is no equal protection problem when the denial of appellate rights to attorneys to the same extent afforded other professionals or litigants is reasonable, resting 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'". Javits v. Stevens, 382 F. Supp. at 140, quoting from F.S. Royster Guano Co. V. Virginia, 253 U.S. 412, 415 (1920).

The discipline of attorneys is a special responsibility which rests with the courts and the vesting of original jurisdiction with the Appellate Division is no denial of equal protection, nor is the denial of an appeal as of right on

all questions of law and fact arbitrary or capricious. (Mildner v. Gulotta, supra).

C. THE STANDARD OF PROOF IN DISCIPLINARY PROCEEDINGS IS STILL A FAIR PREPONDERANCE OF THE CREDIBLE EVIDENCE

The standard of proof in disciplinary proceedings in New York State has traditionally been a fair preponderance of the credible evidence, and although the appellant attempts to impose the standards of "beyond a reasonable doubt" and "clear and convincing evidence", he has failed in doing so time and time again.

As a matter of fact, the Special Referee who heard the case, not only recognized the standard as being "a fair preponderance of the credible evidence" but stated in his report that:

> "I therefore conclude that the petitioner has established

> Charge One as set forth in the Petition, and I so find beyond any reasonable doubt." (Emphasis supplied)
> (See report of Special Referee pages 42a and 43a, reprinted in appellant's appendix).

Nor can the appellant rely upon Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d, 599 (1982) as having changed the standard as that case pertains to parental rights and makes no mention of attorney discipline.

The appellant's constitutional right of due process has not been violated because another standard of proof has not been required in his case.

D. THE COURT SHOULD NOT TAKE JURISDICTION OR GRANT A WRIT OF CERTIORARI

It appears to be well settled law that the Federal Courts will abstain from taking jurisdiction in State disciplinary

proceedings.

In Erdmann v. Stevens, 458 F. 2d, at 1209-10, the relationship between the court and attorneys was expressed as follows:

> " The court alone admits an applicant to practice before it. Thereupon he becomes an officer of the court. The power to discipline, like the power to admit an applicant to membership of the bar, rests exclusively with the court. Theard v. United States, 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, (1928)

Justice Frankfurter, speaking for an unanimous court in Theard quotes Justice Cardozo, while Chief Judge of the New York Court of Appeals, as having said:

> "Membership in the bar is a privilege burdened with conditions." (Matter of Rouss, 221 N.Y. 81, 84 115 N.E. 782, 783).

Here, the appellant has been found to have made false statements to judicial bodies on at least two occasions, in his first disciplinary proceeding and

again in Charge Two of his second disciplinary proceeding. He has also violated the order of suspension of three years by the Appellate Division by engaging in the practice of law during that period, as proven in Charge One of his second disciplinary proceeding. He has obviously disregarded the conditions of membership in the bar which had been bestowed upon him along with the privilege granted him through such membership.

As the court put in it In re Ming, 469 F. 2d 1352, 1353 (7 Cir. 1972):

> "'[s]uch proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from official ministration of persons unfit to

practice.'".
Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1882).

Judge McMahon summarized the special relationship between the attorney and the court, as follows:

> "The intimate and delicate relationship between courts and lawyers has long justified the judiciary's careful scrutiny of the integrity and qualifications of thosewho practice before it. Thus, it would be peculiar, if not unreasonable, for the New York Legislature to place responsibility for disciplinary proceedings elsewhere than in the courts. No other body is as well qualified or as interested in determining whether an attorney is qualified to practice law."
> Javits v. Stevens, supra, 382 F. Supp. at 141.

In this case, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the court in which the appellant was originally admitted and had practiced before for many years, is the proper

court to determine and has determined that he is unfit to practice law.

In Mildner v. Gulotta, supra, Judge Neaher stated that:

> "[t]he federal courts must be extraordinarily reluctant to interject themselves into such proceedings."

The decision in that disciplinary proceeding was for abstention. Such decision was supported by Younger v. Harris 401 U.S. 37 (1971) and Anonymous v. Association of the Bar of the City of New York, 515 F. 2d 427, (2 Cir.)

More recently Chief Justice Burger held that: (1) state bar disciplinary proceedings were of a character to warrant federal court deference; (2) importance of state interest in

pending state disciplinary proceedings and in federal constitutional challenge to disciplinary rules called Younger abstention into play; and (3) because attorney had opportunity to raise and have timely decided by competent state tribunal federal issues involved, and because no bad faith, harassment or other exceptional circumstances dictated to contrary, federal courts should abstain from interfering with ongoing state disciplinary proceedings against him. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 192 S. Ct. 2515 (1982)

CONCLUSION

Based upon the above and upon this appellant's litigious history, we urge the Court to apply the Younger abstention and deny the appellant's application whether it be in the form of a

jurisdictional statement or a writ of certiorari.

Respectfully submitted,

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